86-159

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1986

WALTER J. GRAVER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether servicewomen are accorded equal protection under the law at medical treatment facilities.

2. Whether the *Feres* Doctrine should be re-examined as it applies to physician-patient relationships in military service.

OTHER PARTIES TO PROCEEDINGS

On January 25, 1985, petitioner instituted suit in which Esmark, Inc. and International Playtex were named as defendants in addition to the United States. Thereafter, following a scheduling conference before a U.S. Magistrate, Esmark, Inc. was voluntarily dismissed from the suit. Subsequently, the litigation between the petitioner and International Playtex was settled and an order of dismissal was filed on June 3, 1985.

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No.

In The

Supreme Court of the United States

October Term, 1986

WALTER J. GRAVER

Petitioner,

vs.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Walter J. Graver (hereinafter referred to as "Graver"), prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit affirming the order of the District Court granting

summary judgment is not reported. It appears in Appendix A to this petition.

The opinion of Judge Ackerman of the United States District Court for the District of New Jersey dated May 28, 1985, is not reported. It appears in Appendix B to this petition.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered February 28, 1986. This petition is filed within 90 days of an order extending the time within which to file the petition entered by Honorable William J. Brennan, Jr. Said order appears in Appendix C.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article V of the Constitution of the United States provides in Amendment XIV thereof:

> "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The following section of the Tort Claims Act, 28 U.S.C. § 2674 provides in pertinent part:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

STATEMENT OF THE CASE

A. Statement of Facts

On December 24, 1982 the petitioner Walter J. Graver was an observer and witness to, while a visitor at the bedside of his daughter, PFC Stephanie Weiss, in Overlook Hospital in Summit, New Jersey, the calamitous destruction of her brain as her temperature violently and uncontrollably rose nearly to 107 degrees Fahrenheit. As part of this unpleasant trauma he observed blood hemorrhaging from her nostrils, mouth and ears.

On December 28, 1982 the agony of Stephanie Weiss came to an end and she died. She was 36 years of age and had served in the United States Army for nearly three years. Until December 17, 1982 her health had been generally good. Following her death an autopsy was performed. It listed the major cause of her death to be probable toxic shock syndrome associated with renal, liver and respiratory failure and insufficiency, among other contributing factors.

On or about December 17, 1982 Stephanie Weiss, while stationed at and on duty in Fort Bragg, North Carolina, began to develop "flu like" symptoms. She also began the onset of her menstrual period. She developed a nonproductive cough, fever,

chills, malaise and pleuritic chest pain. Commencing December 19, 1982 and thereafter she was unable to keep food down. On December 20 she went to the Troop Medical Clinic and was given erythromycin to combat the flu. On two subsequent occasions she sought additional medical help, diagnosis and treatment at the Wommack Army Hospital Emergency Room at Fort Bragg. Although her blood pressure had revealed a severe hypothermic condition, she was told only to continue taking the medication and sent back to her barracks. During this period of time, Stephanie Weiss was so ill that she literally had to be carried up and down stairs by her fellow soldiers. In addition, she alternately was feverish and chilled, the chills being so bad that no number of blankets could keep her warm.

No throat culture, blood test or any other medical treatment was afforded Stephanie Weiss by physicians or medical personnel at Fort Bragg. She was scheduled for Christmas leave commencing on December 22. She called her father in New Jersey and advised him that she was very, very sick and that she could not get proper medical attention and would her father arrange for a doctor's appointment as soon as she got home. An appointment was so arranged.

Stephanie Weiss managed to get herself aboard an airplane and returned to Newark Airport. She was barely able to walk and a wheelchair was obtained to assist in removing her from the airport. Upon being seen by a Doctor Robinson of the Summit Medical Group, she was immediately sent to be admitted to Overlook Hospital.

Upon her admission a rapid series of calamities overtook Stephanie Weiss. The clinical impression at the time of admission declares: "1. Hypotension etiology undetermined R/O pulmonary emboli, R/O sepsis. 2. Respiratory insufficiency with metabolic acidosis. 3. Tachycardia." Stephanie Weiss was on a toboggan ride to hell.

Notwithstanding the fact that on December 21 the said Stephanie Weiss was acutely and gravely ill, she was not hospitalized nor was she given a throat culture or blood test. In fact, for some reason which is still known only by the doctors at Fort Bragg, who to this date have not had to come forward and testify, Stephanie Weiss was refused treatment and sent home to die. Had these personnel upheld their Hippocratic oaths and diagnosed and treated her, she would in all likelihood be alive and well today.

B. The Proceedings Below

On February 10, 1984 Graver instituted suit in the United States District Court for the District of New Jersey against International Playtex, Esmark, Inc. and the United States of America.

Thereafter, following a scheduling conference before a United States Magistrate, Esmark, Inc. was voluntarily dismissed from the suit and an amended complaint was filed in the District Court. A motion to dismiss the complaint pursuant to Fed. R. Civ. Proc. 12(b)(6) was filed by the United States of America. The motion was granted by Ackerman, U.S.D.J. by an opinion dated May 28, 1985 and an order of dismissal was entered and filed on May 28, 1985. In the interim, the litigation between the petitioner and International Playtex was settled by and between the parties and an order of dismissal was filed on June 3, 1985.

Notice of appeal of dismissal of the complaint as and against the United States of America was filed with the United States Court of Appeals for the Third Circuit on June 27, 1985.

On February 28, 1986 the United States Court of Appeals for the Third Circuit affirmed the decision of the United States District Court.

REASONS FOR GRANTING THE WRIT

I.

SERVICEWOMEN ARE DENIED EQUAL PROTECTION UNDER THE LAW BY VIRTUE OF GENERAL MEDICAL MILITARY INCOMPETENT TREATMENT ACCORDED FEMALES.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws." Stephanie Weiss was denied the equal protection of the law afforded by the Fourteenth Amendment to the United States Constitution.

On or about December 17th the decedent, Stephanie Weiss, began her menstrual cycle and in conjunction therewith began using Playtex super-tampons manufactured and sold by the co-defendant, International Playtex.* It is difficult to conceive that the onset of menstruation constituted an act arising "out of or in the course of activity incident to service." Her menstrual cycle would have commenced notwithstanding the fact that she was a soldier, or otherwise engaged or employed.

As a general rule, *Feres* and the line of cases following it deal with *men* who are injured while on active duty or who (as in the case of *Lombard*, soldiers who developed illnesses from radiation tests in Nevada and the *Agent Orange* cases which involved servicemen exposed to chemicals and toxins while fighting in the rice paddies of Viet Nam) were exposed to conditions which later gave rise to their illnesses. It is interesting to note that virtually

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* As indicated in the Statement Of The Case, the case involving International Playtex has been settled and is no longer part of these proceedings.

all of the so-called *exceptions* to the *Feres* Doctrine involve wives of servicemen who receive deplorable medical treatment and thus are permitted to sue. *See, e.g., Costley v. United States,* 181 F.2d 723 (5th Cir. 1950) (sergeant can maintain FTCA action for injuries to wife resulting from negligence incident to delivery of a child in an Army hospital); *Grigalauskas v. United States,* 103 F. Supp. 543 (D. Mass. 1951), *aff'd,* 195 F.2d 494 (1st Cir. 1952) (sergeant may recover consequential damages for injuries sustained by infant daughter at Army hospital); *Fournier v. United States,* 220 F. Supp. 752 (D. Miss. 1963) (serviceman and daughter recovered for wife's death caused by negligence of government employees at an officer's club); *Herring v. United States,* 98 F. Supp. 69 (D. Colo. 1951) (serviceman's wife may recover for injury as a patient in Army hospital, the status of injured party is determinative); *Messer v. United States,* 95 F. Supp. 512 (D. Fla. 1951) (sergeant on active duty may recover for injury to wife caused by negligence of Army hospital employees); *Wilscam v. United States,* 76 F. Supp. 581 (D. Hawaii 1948) (naval officer recovered for death of his minor child caused by negligence of naval medical corpsman).

Servicewomen are undeniably still second-class citizens and are treated as such by the armed services. A cogent article in the Wall Street Journal, dated March 14, 1985, reports as follows:

> "Cmdr. Mariner[']s . . . experience illustrates the formidable barriers that military women still face in this most macho of male worlds. Despite an explosion in their ranks and responsibilities over the past 12 years, women in all branches of the armed services except the Coast Guard are still excluded by federal laws and policies from holding jobs in combat units." Wall Street Journal, March 14, 1985 issue, page 33.

The rationale for excluding women from combat units is to prevent them from being placed in a situation where they could be wounded or killed in the event of a war or armed conflict. The underlying premise from which the *Feres* Doctrine was developed was an acceptance of the fact that there is a genuine risk inherent in preparing for and going into combat: a lot of people can get hurt and many do in fact, get killed. Therefore, in order to preserve military discipline in the truest sense of the term and the "peculiar and special relationship of the soldier to his superiors", lawsuits are not permitted in these circumstances.

Getting injured in combat or even training is a very far cry from what transpired in the tragic case of Stephanie Weiss. To date the United States has not been forced to come forward and explain why its medical personnel — doctors who in civilian life would assuredly be forced to respond for damages for gross dereliction of their responsibilities as physicians and surgeons — refused to treat or even diagnose the ailments of Stephanie Weiss. The District Court's opinion acknowledges that this "case arises out of an extraordinarily unfortunate set of facts arising in part from the alleged negligence of an Army doctor;" but concludes that while it is impressed with petitioner's attempts to distinguish *Feres* it is "constrained to hold that in spite of the extremely unfortunate facts of this case the *Feres* Doctrine and its progeny bar Plaintiff from suing the United States." (*cf.*, Appendix B).

The basis for the District Court's conclusion is the precedent established in *Henning v. United States*, 446 F.2d 774, 776-77 (3d Cir. 1971), *cert. denied,* 404 U.S. 1016 (1972). *Henning* held that a serviceman could not recover for the negligence of an Army doctor who misread his x-rays and who failed to advise the serviceman of a tubercular condition.

It is respectfully submitted that the holding in *Henning* can be distinguished on two separate bases and that its holding should

be therefore circumscribed by this Court upon a reconsideration of the *Feres* Doctrine.

First, *Henning* involved a male soldier who was misdiagnosed while a patient in an Army hospital. The case of Stephanie Weiss involves a failure and rejection at the first level of response, namely, at the Troop Medical Clinic and, subsequently, at the Emergency Room at Wommack Army Hospital at Fort Bragg where she was denied treatment essentially because those treating (if such can be the term) failed to have proper training in diagnosing toxic shock syndrome, an affliction that primarily affects women who use super-absorbant tampons during the menstruation period. It is one thing for the government to disclaim liability for improper diagnosis or treatment on the ground that "it calls into question basic choices about the discipline, supervision, and control of a serviceman . . . . To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions." [*United States v. Shearer,* 105 S. Ct. 3039 (1985) at p. 3043.]

Second, and more importantly, however, this case under review does not in any way relate to any challenge that can be characterized as a challenge to a "straightforward personnel decision". (*Shearer, ibid.*, p. 3041; *cf., Feres, supra*). Stephanie Weiss sought medical treatment for an illness which was occasioned by her femininity and which was probably proximately caused by her using a product (super-tampons) which induced the toxic shock syndrome which ultimately led to her death. But, as statistical evidence proves, less than 5% of toxic shock syndrome cases result in death. The key, obviously, is proper and timely diagnosis and treatment. This was denied to her and it is submitted that it was denied for one reason only: that the medical personnel trained to treat fighting men in the armed services were unable to cope, diagnose or treat the peculiar disease from which

Stephanie Weiss died. Absent the military atmosphere, this case does not involve the chain of military command at all. It is succinctly a physician-patient relationship, or, more properly, the absence thereof since the physicians involved effectively refused to treat or were unable to treat, the deceased.

It is submitted that the failure to provide Stephanie Weiss with physicians able to adequately treat both male and female soldiers on an even footing and with equal skill, deprived her not only of the equal protection of the law as afforded by the Fourteenth Amendment, but of her life as well (*cf.*, Declaration of Independence).

II.

THE SUPREME COURT SHOULD RE-EXAMINE AND PERMIT PHYSICIAN-PATIENT EXCEPTION TO "*FERES*" DOCTRINE.

It is well established that the United States, as sovereign, "is immune from suit save as it consents to be sued, ... and the terms of its consent to be sued in any court define that court's jursidiction to entertain the suit." *United States v. Sherwood,* 312 U.S. 584, 586, 61 S. Ct. 767, 769, 85 L. Ed. 1058 (1941); *United States v. Testan,* 424 U.S. 392, 399, 96 S. Ct. 948, 953, 47 L. Ed. 2d 114 (1975). Any waiver of this traditional sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King,* 395 U.S. 1, 4, 89 S. Ct. 1501, 1502, 23 L. Ed. 2d 52 (1968); *Soriano v. United States,* 352 U.S. 270, 276, 77 S. Ct. 269, 273, 1 L. Ed. 2d 306 (1957).

The Tort Claims Act is one such explicit waiver. It provides that in most instances of tortious conduct, the "United States shall be liable, respecting . . . tort claims, in the same manner and to the same extent as a private individual under like

circumstances." 28 U.S.C. § 2674. The application of the Act has been construed in *Dalehite v. United States,* 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953); *Laird v. Nelms,* 406 U.S. 797, 799, 92 S. Ct. 1899, 1900, 32 L. Ed. 2d 499 (1971); and *Scanwell Laboratories, Inc. v. Thomas,* 521 F. 2d 941, 947 (D.C. Cir. 1975). Notwithstanding the language of the statute, however the Supreme Court has determined that the Act does not waive sovereign immunity for suits brought by servicemen for "service connected injuries," *Feres v. United States,* 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950); *Hatzlachh Supply Co., Inc. v. United States,* 444 U.S. 460, 100 S. Ct. 647, 62 L. Ed. 2d 614 (1980); *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 97 S. Ct. 2054, 52 L. Ed. 2d 665 (1976). In *Feres v. United States, supra,* the Court held without dissent that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S. Ct. at 159.

This so-called "*Feres* Doctrine" has been followed by subsequent decisions of the Supreme Court and other federal courts. Three factors typically underlie the doctrine's application. First, there is the interpretation of the statute which flows from the "distinctively federal nature" of the relationship between the federal Government and members of its Armed Forces. This supports an interpretation that Congress did not intend the Tort Claims Act to be applicable to service-related injuries because the Act provides that "the law of the place where the act or omission complained of occurred . . ." shall be applied and "it would make little (legislative) sense to have the Government's liability to members of the Armed Services dependent on the fortuity of (the provisions of law applicable in the locality) where the soldiers happened to be stationed at the time of the injury." *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 671, 97 S. Ct. 2054, 2057, 52 L. Ed. 2d 665 (1976). *See Feres v. United States, supra,* 340 U.S. at 143, 71 S. Ct. at 157.

The second factor supporting the *Feres* interpretation is the existence of the Veterans' Benefits Act, 38 U.S.C. §§ 301-1008, a form of no fault compensation scheme for servicemen, akin to workmen's compensation laws, that substitutes for tort liability.

The final but most important factor underlying the *Feres* interpretation of the statute, as articulated most clearly by the Supreme Court in the subsequent case of *United States v. Brown,* 348 U.S. 110, 112, 75 S. Ct. 141, 145, 99 L. Ed. 139 (1954) is the

> "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty."

In addition to its application to cases brought by servicemen concerning injuries suffered while on active duty in the armed services, *Feres* has also been held to bar cases brought by third parties (usually family members) where the claim originates with or derives from an injury to a serviceman incident to military service. In such cases, relief is "unavailable for essentially the same reasons that the direct action (was) . . . barred in Feres." *Stencel Aero Engineering Corp. v. United States, supra,* 431 U.S. at 673, 97 S. Ct. at 2058.

Of central importance in scrutinizing cases against the Government in light of *Feres* is an adherence to "the line drawn in the *Feres* case *between injuries that did and injuries that did not arise out of or in the course of military duty.*" *United States v. Brown, supra,* 348 U.S. at 113, 75 S. Ct. at 145. Thus, in *Henry v. Textron, Inc.,* 577 F. 2d 1163 (4th Cir. 1978), for example, the Government was held immune from liability to a third party

defendant and two National Guard helicopter pilots killed while on active duty as a result of allegedly defective helicopter construction by the third party defendant.

In *United States v. Brown, supra,* meanwhile, a discharged veteran suffered an injured left knee due to negligent treatment by doctors in a Veterans Administration hospital. Though the Government urged that the ensuing tort suit be dismissed as being barred by *Feres*, the Supreme Court ruled that the serviceman's injury was not incident to military service, and suit was accordingly authorized under the Federal Tort Claims Act. *Lombard v. United States,* 690 F. 2d 215, 69 A.L.R. Fed. 921 (C.A. D.C.).

As hereinbefore stated, *Feres* held that "the Government is not liable . . . for injuries to servicemen when the injuries *arise out of or are in the course of activity incident to service.*" (Emphasis added, *Feres, supra* at 340 U.S. 146, 71 S. Ct. 159.)

In the instant case, both the District Court and the Court of Appeals have felt constrained to conclude that your petitioner, while admittedly suffering grievous harm and almost assured medical malpractice by Army doctors and medical personnel, is nonetheless barred from any avenue of recovery. Each court expressed its sympathy and condolences as if it said it was sorry that there was nothing it could do.

The point of fact is that unless this tribunal is willing to re-examine the narrow frame which involves a medical malpractice exception to the *Feres* Doctrine, then your petitioner is left with a claim without a remedy. The Congress of the United States has addressed itself to this particular problem. H.R. 3174, passed by the House of Representatives on October 7, 1985 (Appendix D) provides that "claims may be brought under this chapter for damages against the United States for personal injury or death of a member of the Armed Forces." [§ 2681(a)] for injuries which

have "arisen out of medical or dental care furnished the member of the Armed Forces in a fixed medical facility operated by the secretary of a military department or any other fixed medical facility operated by the United States." [§ 2681(b)].

Even assuming, however, the eventual enactment of this law (the bill is presently in committee in the Senate), your petitioner would in all likelihood fall within the class having a claim without recognition since Section 2 of H.R. 3174 provides that only claims for personal injury or death occurring after the effective date of enactment will be eligible to sue.

Petitioner does not seek to create novel avenues of recovery. The claim will not undermine the "peculiar and special relationship of the soldier to his superiors." It will not in any way adversely affect the "discipline" required in the Armed Forces, nor will it tend to promulgate the "extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty." *United States v. Brown, supra.*

Absent the Armed Forces setting, petitioner's suit is purely and simply a medical malpractice suit involving a physician and his patient. To permit the continued intolerable and unjust practice of permitting incompetent Armed Forces doctors to conceal the badges containing their Hippocratic oaths behind military insignias reflecting their immunity from prosecution is both unjust and immoral. Your petitioner prays that this Court will not further countenance this prospect and that it will reconsider the issue as framed and defined herein.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

ARTHUR P. CONDON
Attorney for Petitioner

APPENDIX A—OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5437

WALTER J. GRAVER, Administrator of the Estate of Stephanie Weiss; and Walter J. Graver, Individually

v.

INTERNATIONAL PLAYTEX, ESMARK, INC., and THE UNITED STATES OF AMERICA

Walter J. Graver, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 84-0558)

District Judge: Honorable Harold A. Ackerman

Argued February 21, 1986

Before: WEIS and SLOVITER, *Circuit Judges*, and ZIEGLER,*
District Judge

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* The Honorable Donald E. Ziegler, United States Court for the Western District of Pennsylvania, sitting by designation.

Appendix A

WEIS, *Circuit Judge.*

The decedent was a member of the United States Army and was stationed at Fort Bragg, North Carolina. Feeling ill in December 1982, she went to the Army hospital emergency room. Her condition was diagnosed as influenza and she was prescribed erythromycin. She returned home to New Jersey on December 22, and was admitted to a civilian hospital where she died on December 28, 1982. The cause of death was determined to be toxic shock syndrome.

An action brought against International Playtex Corporation was settled. The claim against the United States under the Federal Tort Claims Act was dismissed by the district court under the *Feres* doctrine.

Essentially, the plaintiff's suit against the government is based on an alleged malpractice of the Army medical personnel in misdiagnosing the decedent's illness. Plaintiff contends that *Feres v. United States,* 340 U.S. 135 (1950), should not apply because the injury here did not arise in the course of military duty and that the doctrine is based on the eventuality of soldiers being wounded or killed in combat. Since service women are not permitted in combat units, plaintiff argues that *Feres* is not pertinent.

These arguments were considered by the district court, which correctly declined to accept them. In *Henning v. United States,* 446 F.2d 774 (3d Cir. 1971), we held that the government was not liable for failing to properly diagnose a serviceman's illness that first occurred while in service. We said that, "[t]he focus is thus upon when and how the negligent act occurs." *Id.* at 777. *Harten v. Coons,* 502 F.2d 1363 (10th Cir. 1974), also denied

recovery on the plaintiff's suit for damages resulting from medical malpractice which occurred while he was on duty. In defining "incident to service," the court said the test "depends on the claimant's status at the time of the injury." *Id.* at 1365. *See also Heilman v. United States,* 731 F.2d 1104 (3d Cir. 1984); *Hinkie v. United States,* 715 F.2d 96 (3d Cir. 1983); and *Mondelli v. United States,* 711 F.2d 567 (3d Cir. 1983).

Although the *Feres* doctrine has been criticized, the Supreme Court has reaffirmed its vitality, *see United States v. Shearer,* 105 S. Ct. 3039 (1955); *Chappell v. Wallace,* 462 U.S. 296 (1983). We find no basis for assuming that the Supreme Court's approval of *Feres* depends in any way upon whether the soldier is a member of a combat or service unit.

The district court did not err in its interpretation of the applicable law, and accordingly, its judgment will be affirmed.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

s/ Weis
Circuit Judge

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5437

WALTER J. GRAVER, Administrator of the Estate of Stephanie Weiss; and Walter J. Graver, Individually

v.

INTERNATIONAL PLAYTEX, ESMARK, INC., and THE UNITED STATES OF AMERICA

Walter J. Graver, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Before: WEIS and SLOVITER, *Circuit Judges,* and ZIEGLER,*
District Judge

JUDGMENT

This cause came on to be heard on February 21, 1986.

On consideration, it is now ordered and adjudged by this Court that the judgment entered May 28, 1985 be and the same is hereby affirmed.

ATTEST

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* The Honorable Donald E. Ziegler, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Appendix A

s/ Sally Mrvos
Clerk

Certified as a true copy and issued in lieu of a formal mandate on March 24, 1986.
Test: M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

APPENDIX B—DISTRICT COURT OPINION AND ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 84-558

WALTER J. GRAVER, etc.,

Plaintiff,

-vs.-

INTERNATIONAL PLAYTEX, et al,

Defendants.

Newark, New Jersey
May 28, 1985

TRANSCRIPT OF PROCEEDINGS

OPINION

B E F O R E:

THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

Appearances:

ARTHUR P. CONDON, ESQ.
Attorney for Plaintiff

W. HUNT DUMONT
UNITED STATES ATTORNEY
BY: RUTH V. SIMON
ASSISTANT UNITED STATES ATTORNEY
Attorney for the Government

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THE COURT: This case arises out of an extraordinarily unfortunate set of facts arising in part from the alleged negligence of an Army doctor.

Stephanie Weiss was a member of the United States Army on active duty and assigned to Fort Bragg, North Carolina.

On or about December 17, 1982, Stephanie Weiss, while stationed at and on duty in Fort Bragg began to develop "flu-like" symptoms. She also began the onset of her menstrual period. She developed a nonproductive cough, fever, chills, malaise and pleuritic chest pain. Commencing December 19, 1982, and thereafter, she was unable to keep food down. On December 20 she went to the Troop Medical Clinic Number 15 and was given erythromycin. On December 21 she went to the Wommack Army Hospital Emergency Room at Fort Bragg. She was told to continue taking the medication and sent back to her barracks. During this period of time Stephanie Weiss was so ill that she was literally carried up and down stairs by her fellow-soldiers. Her chills were so bad that no number of blankets placed on her could keep her warm.

No throat culture or blood test was administered to Stephanie Weiss by medical personnel at Fort Bragg. She was scheduled for Christmas leave commencing on December 22, She called her father and advised him that she was very sick but that she could not get any proper medical treatment. Her father arranged for an appointment with her home physician for as soon as Stephanie arrived home. Upon arrival at Newark Airport, she was assisted off the plane in a wheelchair. She saw a doctor at the Summit Medical Group in Summit, New Jersey, and was immediately admitted to Overlook Hospital. While in the hospital, her condition rapidly declined. Stephanie's father, the plaintiff in this case,

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Walter Graver, sat at her bedside and watched her temperature rise to 107 degrees as blood spurted from nostrils, mouth and ears. On December 28, 1982, Stephanie Weiss expired.

Subsequent to her death an autopsy was performed. It listed the major cause of her death to be probable toxic shock syndrome associated with renal, liver and respiratory failure and insufficiency, among other contributing factors. The United States Military Hospital never diagnosed Stephanie's toxic shock syndrome in the course of her visits there. Notwithstanding the fact that on December 21 Stephanie was acutely and gravely ill, she was not hospitalized nor was she given a throat culture or a blood test. If she had been, plaintiff alleges that in all likelihood she would be alive and well today.

The United States now moves to dismiss plaintiff's claim against it on the grounds that the Government is not liable under the Federal Tort Claims Act for injuries to Service members where those injuries arise out of or are in the course of activity incident to Military Service. See *Feres v. United States,* 340 U.S. 135 (1950).

Plaintiff has responded to the Government's Motion to Dismiss by distinguishing this case from the type of case intended to be barred under the *Feres* Doctrine. Plaintiff contends that *Feres* only covers injuries which arise out of or are in the course of activity incident to Service. Citing to *Feres* at Page 146. And that it is difficult to conceive that the onset of menstruation constituted an act arising out of or in the course of activity incident to service.

Plaintiff also contends that this case is distinguishable because this case involves a Servicewoman and not a Serviceman. Plaintiff intends to show at trial why this is an important distinction. He

alleges that Servicewomen are undeniably still second-class citizens and are treated as such by the Armed Forces.

He accurately notes that women in the Armed Forces are still excluded from combat units. This is relevant to the distinction plaintiff makes under *Feres* because one of the essential rationales from which the *Feres* Doctrine developed was a recognition of the fact that there is genuine risk inherent in preparing for and going into combat: A lot of people can get hurt and many, even get killed.

As Stephanie Weiss was not in training in any conceivable way for combat, this rationale does not apply to her situation. What plaintiff proposes to prove if given the opportunity is that the training received by medical corpsmen and even Army doctors is male oriented and just as it is the case that women are second-class soldiers by reason of their combat limitations, so, too, are they second-class persons when it comes to medical treatment of illnesses, especially such as toxic shock syndrome. Plaintiff alleges that the medical personnel who treated decedent probably have never heard of toxic shock syndrome and possess no knowledge of how to treat it.

In addition to distinguishing this case from those covered by the *Feres* Doctrine, plaintiff presents an equal protection argument. He contends that when inducted into the Service of the United States of America, the decedent, Stephanie Weiss, was entitled to equal protection under the laws of the Constitution of the United States. She and all other females were entitled to the same quality of medical care that their male counterparts receive. He alleges that her needless death is testament to the fact that equal care and treatment was not available.

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While I am impressed by plaintiff's attempts to distinguish this case from *Feres*, I am constrained to hold that in spite of the extremely unfortunate facts of this case the *Feres* Doctrine and its progeny bar plaintiff from suing the United States.

It is well established that an active duty soldier receiving medical care at an Army hospital is engaging in activity that is considered "incident to Service" and therefore, claims arising therefrom are barred under *Feres*. See, for example, *Henning v. United States*, 446 F. 2d 774, 776-77 (3d Cir. 1971, *cert. denied*, 404 U.S. 1016 (1972).

In *Henning* the Third Circuit ruled that a Serviceman could not recover for negligence of an Army doctor in misreading his x-rays and in failing to advise the Serviceman of a tubercular condition. The Third Circuit recently reaffirmed the *Hennings* holding in *Heilman v. United States*, 731 F. 2d 1104, 1107 (3d Cir. 1984), and *Shearer v. United States*, 723 F. 2d 1102 (3d Cir.), *cert. granted*, 105 S. Ct. 321 (1984).

In *Shearer*, the Court noted "Malpractice to an active duty soldier in an Army hospital is, by its very nature, considered activity incident to Military Service and therefore is barred under *Feres*."

Although plaintiff correctly notes that menstruation and the ensuing toxic shock syndrome are certainly not logically "out of or in the course of activity incident to Service," the same could really be said of plaintiff's tubercular condition in *Henning* which plaintiff did not allege to have contracted due to anything he was exposed to during his Military Service. In both *Henning* and in this case, the operative fact is failure to diagnose, and the condition which allegedly negligent Military doctors overlooked is not relevant to the legal analysis under *Feres*.

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While the injuries sustained here do fall within the "incident to Military Service" ambit, the cases interpreting that phrase did not address an equal protection argument such as the one put forth by plaintiff here. Plaintiff's equal protection argument has unfortunately also been foreclosed by the United States Supreme Court's recent ruling in *Chappell v. Wallace,* 462 U.S. 296 (1983).

In *Chappell* the Court held that enlisted Military personnel may not maintain a suit to recover damages from a superior officer for alleged Constitutional violations.

I must, therefore, dismiss plaintiff's Complaint against the United States as the present state of the law affords no legally cognizable cause of action against the United States or individual Military officers under these facts no matter how egregious their actions were.

* * *

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 84-558

Hon. Harold A. Ackerman

WALTER J. GRAVER, Administrator of the Estate of STEPHANIE WEISS, and WALTER J. GRAVER, Individually,

Plaintiff,

v.

INTERNATIONAL PLAYTEX, ESMARK, Inc., and THE UNITED STATES OF AMERICA,

Defendants.

ORDER

This matter having been opened to the Court by W. Hunt Dumont, United States Attorney of the District of New Jersey (By: Vincent E. Gentile, Assistant United States Attorney), on behalf of defendant, United States of America, for an order pursuant to Fed. R. Civ. Proc. 12(b)(6) dismissing the complaint for failure to state a claim upon which relief can be granted, and the Court having considered the arguments and submissions of the parties and good cause appearing,

IT IS on this 28th day of May, 1985,

ORDERED that the defendant's motion to dismiss the

complaint against the United States of America be and hereby is granted, and the United States of America is dismissed as a defendant in this action. No costs.

s/ Harold A. Ackerman
HAROLD A. ACKERMAN,
JUDGE
UNITED STATES DISTRICT
COURT

ENTERED
on The Docket
on 5-30-1985
ALLYN Z. LITE, CLERK
s/ Charles Sandler
(Deputy Clerk)

APPENDIX C—ORDER EXTENDING TIME

SUPREME COURT OF THE UNITED STATES

No. A-814

WALTER J. GRAVER, ADMINISTRATOR OF THE ESTATE OF STEPHANIE WEISS, DECEASED, ET AL.,

Applicants,

v.

INTERNATIONAL PLAYTEX, ESMARK, INC., AND UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 28, 1986.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 24th
day of April, 1986.

APPENDIX D—H.R. 3174

99th CONGRESS
1st Session

H.R. 3174

IN THE SENATE OF THE UNITED STATES

October 9 (legislative day, SEPTEMBER 30), 1985

Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend chapter 171 of title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CLAIMS FOR IMPROPER MEDICAL CARE.

(a) COGNIZABLE CLAIMS.—Chapter 171 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 2861. Certain claims by members of the Armed Forces

"(a) CLAIMS OF MEMBERS OF ARMED FORCES—Subject to all the provisions of this

chapter, claims may be brought under this chapter for damages against the United States for personal injury or death of a member of the Armed Forces serving on active duty or on full-time National Guard duty (as defined in section 101(42) of title 10), under the conditions prescribed in this section.

"(b) WHERE CARE PERFORMED.—The personal injury or death referred to in subsection (a) must have arisen out of medical or dental care furnished the member of the Armed Forces in a fixed medical facility operated by the Secretary of a military department or any other fixed medical facility operated by the United States.

"(c) DEFINITIONS.—For purposes of this section:

"(1) The term 'fixed medical facility' means a medical center, hospital, or clinic that is located in a building, structure, or other improvement to real property.

"(2) The term 'personal injury' does not include mental or emotional disability unless it is the direct result of a physical injury.

"(d) REDUCTION OF CLAIMS BY OTHER BENEFITS.—The payment of any claim for personal injury or death of a member of the Armed Forces under this section shall be reduced by the present value of other benefits received by the member and the member's estate, survivors, and

beneficiaries, under title 10, title 37, or title 38 that are attributable to the personal injury or death from which the claim arose."

(b) CLERICAL AMENDMENT.—The table of sections for chapter 171 of title 28, United States Code, is amended by adding at the end the following new item:

"2681. Certain claims by members of the Armed Forces."

SEC. 2. EFFECTIVE DATE.

Section 2681 of title 28, United States Code, as added by section 1 of this Act, shall apply only with respect to personal injuries or deaths occurring on or after the date of the enactment of this Act.

Passed the House of Representatives October 7, 1985.

Attest: BENJAMIN J. GUTHRIE,
Clerk.